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WHY and HOW

The Wagner Act Should Be Amended

Excerpts from

A Statement of the

NATIONAL ASSOCIATION OF MANUFACTURERS

Presented by its Counsel, JOHN C. GALL

Before the

COMMITTEE ON EDUCATION AND LABOR

of the

UNITED STATES SENATE

I. *Introductory*

Mr. Chairman and Gentlemen of the Committee:

My name is John C. Gall. I am Counsel for the National Association of Manufacturers, a voluntary association of manufacturers, incorporated under the laws of the State of New York. Our membership includes more than seven thousand five hundred manufacturing establishments located throughout the United States. Our members are engaged in all forms of manufacture; their plants range in size from those employing only a few workers to those employing many thousands.

Manufacturers are vitally interested in the matter before this Committee. Among our member companies are many who deal collectively with unions affiliated with the American Federation of Labor, many who deal with unions affiliated with the Congress of Industrial Organizations, many who deal with independent unions, not affiliated with national or international organizations, and many, particularly among the smaller companies, whose employees have not elected to affiliate with any labor organizations. Some of our members have collective relations with two or more labor organizations representing employees of different plants or classes. A large percentage of our members have had these collective relations for many years prior to passage of the National Labor Relations Act.

From the statement just made, the Committee will properly conclude that we are not primarily interested in the question of which form of labor organization is ultimately victorious as a result of the rivalry which has been so much discussed before this Committee. We are interested in the effect of the national labor policy on the employment relation in general, and on employers, unorganized employees and the public, recognizing, of course, that industrial employers and employees themselves form a substantial part of the public.

Position of Association

We come before this Committee of Congress on the assumption and in the belief that the members of the Committee are anxious to receive all information and views, from whatever source, which may assist in arriving at a proper adjustment of legislation applicable to the employment relation. We do not conceive of this as a forum for placing any particular labor organizations or employers' associations on trial, but rather as a forum for examining the national policy with respect to industrial relations and determining whether the policy be defective in any respect, either in fundamental theory, or in administrative application.

We are firmly convinced that the Act and its administration by the present Board leave much to be desired. During the course of our presentation we shall suggest various amendments for your consideration. Some of these proposals we urged upon Congress before the Act was passed. We are of the opinion that their adoption then would have promoted the declared objectives of the Act, would have operated to reduce the number of industrial disputes, and would have insured better administration. While we do not endorse any of the

pending bills in their entirety, we are in hearty accord with most of the provisions of the Walsh, Burke and Ellender bills. On some minor points, we have reservations, which will be discussed as we proceed.

This Committee is undoubtedly interested not only in knowing of specific cases in which we think the Act or its administration has been demonstrated to be defective, but in examining the state of mind throughout industry as to the operation of the Act. As to the latter there can be no question. There is throughout the business world a conviction that the National Labor Relations Board and its agents have been intensely pro-CIO, that they have been hostile to employers, to independent unions and to employees not affiliated with national unions, that they have violated many elementary principles of fair play, and that they have not only *not* contributed to a reduction of the volume of labor disputes, but have in fact sown the seeds of future discord. If this state of mind is justified, as we believe it to be, the situation seems to call for such revision of the Act and such safeguards in administration as will win for the Act and whatever Board administers it, the public respect which is now lacking. Without the confidence of all affected groups, it is unlikely that any agency of government can function successfully.

Act Is Defective

The suggestion has been made from time to time during these hearings that the chief fault at present lies in the administration of the Act and not in the Act itself. There is no question but that wise and just administration could have produced a different result, both as a matter of law and as a matter of meriting public approval. We are firmly convinced, however, that the Act itself, in its present form, is defective in several important particulars, that it creates inequalities contributing directly to industrial discord, and that its silence on matters of great public importance is a serious omission which provides a ready excuse for unfair administration.

At the outset, so that there can be no justifiable ground for anyone to misinterpret our position, we wish to make it clear that we do not advocate repeal of the Act, nor do we seek amendments which will deprive employees of any rights which Congress intended them to have. We have tried to consider every proposal for amendment on its merits, testing it not by the fact that the present Board has in our judgment been guilty of perverting the present Act, but by the question of whether the proposed amendment would serve a useful purpose as part of our permanent law. Bad administration is to be deplored, but we have tried honestly to judge proposed amendments by what their effect would be under improved administration. We will not endorse or urge upon the Congress any amendment which we think is not consistent with sound principles of law and public policy.

Members and employees of the National Labor Relations Board have frequently argued that the National Labor Relations Act is not unfair or one-sided "when viewed in its setting", that it must be examined in the light of other laws, Federal, State and local, which impose obligations and restraints on one or both parties to the employment relation. Senator Wagner likewise declared that the Act must not be examined in an "intellectual vacuum". With these declarations

we are in hearty agreement. Unless the Committee considers the operation of this law in relation to other laws, notably the Norris-LaGuardia Anti-Injunction Act and its various state counterparts, the picture is woefully incomplete. The argument against amending the National Labor Relations Act is based largely upon the declaration that this particular statute need not state any of the obligations of employees or labor organizations, because other laws provide adequate remedies for employers, that the latter may restrain wrongful acts by labor, that they may bring suits for breaches of contract, and that violence, coercion and intimidation are already punishable under local law. Some reference to these other alleged remedies is therefore necessary, and will be made from time to time where appropriate to the consideration of specific amendments.

Congress' Intent Disregarded By Board

Much time has been spent in discussing whether the present Board has or has not done a good job of administering the Act as it is now written. It seems to us that question turns entirely upon whether the present Board has carried out the intention of the Congress which enacted the statute. That intention on many points must be determined by the official declarations of those who sponsored the bill in Congress, because on many of these points the statute itself is silent. It may be pertinent, therefore, to inquire:*

> Did Congress intend that the Board should protect sit-down strikers and other strikers engaging in violence, intimidation and coercion, ordering the employer to reinstate them with pay for the time when they were engaged in destroying the business itself?
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> Did Congress intend that the Board should compel employers to continue to bargain with representatives of a union which had violated collective agreements already made with the employer?
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> Did Congress intend that the Board should order employers whose employees had struck as a result of no unfair labor practice whatever on the part of the employer, to reinstate such strikers, if necessary discharging other employees to make jobs for those reinstated?
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> Did Congress intend that the Board should compel employers to bargain with union representatives without reference to the character or conduct of such representatives?
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> Did Congress intend that the Board should prevent employers from expressing their opinions or stating truthfully the facts about unionism in general or particular unions, even when employees themselves sought the employers' opinions?
>
> Did Congress intend that the Board should order all employers in an industry or portion thereof to bargain with a particular union, even though the effect might be to

* Wherever the term "Board" is used it of course includes agents and employees of the Board, just as the employer is held responsible for the acts and statements of his employees.

deprive large numbers of employees in the industry of their right to bargain collectively through their chosen representatives?

Did Congress intend that the Board should deny the right to ordinary incidents of a fair trial, including full statements of charges, equal right to subpoena witnesses, equal right to introduce evidence, etc.?

Did Congress intend that the National Labor Relations Board should act in any instance as organizer for the unions, seeking to persuade or induce employees to join them, and seeking to persuade employers to enter into agreements with the unions?

Did Congress intend that the Board should undertake to destroy independent unions not affiliated with the CIO or the AF of L, merely because such unions were lawfully initiated many years ago with employer cooperation and support?

Did Congress intend that the Board should hold employers responsible for things done by third parties, with no proof of any authorization, direction, or ratification by the employer, and should hold employers responsible for statements made by subordinate employers who had no authority to hire or fire, where there was no evidence that the employer had sanctioned such statements?

Did Congress intend that the Board should order employers to reinstate discharged employees who had been guilty of insubordination, had reported for work in a state of intoxication, had ruined work and damaged property of the employer?

Did Congress intend that the Board should exhibit hostility toward employers and their associations while championing the right of employees to organize into associations?

These illustrations are intended to be typical rather than exhaustive. If these questions can properly be answered in the affirmative, then the chief complaint, in our opinion, is against the statute itself. If they cannot be answered in the affirmative, then, unless the Congress desires to ratify what has been done by the present Board, it would seem that amendments should be adopted which will announce the Congressional intention in such plain and unmistakable terms as to leave no room for this Board or its successors to infer a different intention.

IX. *Has the Act Established "Equality" or Has It Established a New "Inequality"?*

The preamble to the National Labor Relations Act declares as a premise that there is an inequality of bargaining power "between employees who do not

possess full freedom of association or actual liberty of contract, and employers . . . ". It then declares a major purpose of the Act to be "restoring equality of bargaining power between employers and employees."

The Act therefore deals with an inequality of bargaining power between *employers and employees.* Senator Wagner is therefore right, as far as he goes, in saying that the Act in protecting the rights of employees is not one-sided merely because it does not also state and protect the rights of employers. He refers to the Workmen's Compensation Acts as an analogy But the analogy to Workmen's Compensation Acts only emphasizes the new inequality produced by the National Labor Relations Act, as interpreted and applied: Those acts confer benefits on employees without reference to whether the employees are or are not members of labor organizations. The National Labor Relations Act, in actual operation, recognizes rights and creates remedies for employees based upon their desire to join labor organizations and deal with the employer through a new entity—the labor organization.

The question therefore is not whether the Act is unequal as between employers and employees, regarding each as an individual or legal entity. The question is whether the Act, as applied, is unequal *as between the employer and the labor organization.* We submit that it is patently unequal in this respect, as applied. It is true that the Act itself confers no benefits or privileges on labor organizations as such, but the tendency of Board decisions is clearly in that direction.

Union Held Principal, not Agent

The Board, following a precedent laid down by the original National Labor Board, declines to regard the union as a mere agent of the employees. It treats the union as a *principal,* and thus introduces a new legal entity into the picture. The following illustrations will suffice to show this:

1. A union, claiming to represent a majority of employees, and making demands for collective bargaining upon the employer, need not disclose to the employer the names of those it claims to represent. In all other fields of law, anyone may demand that an agent disclose who his principals are, or may refuse to deal with him. But the union need not make such disclosure.

2. When a collective agreement is reached with an employer, the latter is required by the Board, upon request of the union, to reduce the terms to writing, for a definite period, in an instrument *between the employer and the union.* Thus the union is regarded not as an agent, but as a principal.

Special Privilege for Union

This trend, of considering the union not as a mere agent of the employees after it has been selected, but as a principal with rights of its own under the National Labor Relations Act, is emphasized in the intermediate report of Trial Examiner Paradise (the Examiner whose conduct was severely condemned by the C. C. A. in the *Montgomery Ward Case*) in *In re Cities Service Oil Company, Pure Oil Company, and The Texas Company.* In that case, the trial examiner held that the refusal by the companies to authorize representatives of the National Maritime Union to board their tankers was an unfair labor prac-

tice, and he recommended that the Board require the companies to permit authorized representatives of the union to board their vessels. In arriving at his conclusion, the examiner relied upon extensive testimony showing the prevalence of permitting union officials to transact union business on the employer's premises. In addition, he stated that since seamen are ordinarily in port only for a limited time, and are anxious to relieve the monotony of living at sea during that period, it is extremely difficult for union representatives to contact them. This, he says, limits the union's responsiveness to its membership, and makes it impossible to collect dues or confer either with the workers or the ship's master for adjustment of grievances. "The only place", says the trial examiner, "where the union can be reasonably certain of contacting its members is on board the vessels."

New Inequalities Between Employers and Unions

No consideration of this question of equality would be complete, therefore, without keeping in mind always that the *Act* talks of equality between *employers and employees,* but the Board's application of the Act raises an entirely new question of inequality *as between individual employers and labor organizations.* When members of the Board refer to remedies against individual employees under local police laws, etc., to prove there is no inequality, they are ignoring completely the issue as between employers and labor organizations.

Senator Burke obviously recognized this when he said here:

> "There are really five parties affected by any labor relations law and its administration. There is the employer; there is the unorganized workingman; there is the organized workingman; there is the union leader; and finally, there is the public. The rights of all must be safeguarded."

It might be of interest to this Committee also to refer to an address made by Dr. William M. Leiserson, who has recently been appointed a member of the National Labor Relations Board. This address was delivered in February, 1928, before the American Management Association. In it, Dr. Leiserson said:

> "As I see it, looking on you as a bunch of bugs and at the trade unions as another collection of bugs—here is what I find under the microscope. *Competition for leadership of labor.* You have your ordinary labor leader who learned his job under the small employer who knew everybody by name. Then you have the modern industrial relations managers who learned their jobs in the colleges of engineering and business administration, who studied labor psychology and industrial relations and scientific management. You have competition for leadership of labor, and these industrial relations managers are winning out in that competition with the labor movement. In my judgment, trade unionism is losing in proportion as employee representation and the other devices of modern personnel management are becoming effective. . . .
>
> "Just as your representation plans are duplicating the devices of unionism, and you are copying and learning many things from the unions, so the unions could learn many things from your plans. Unfortunately, however, they have not learned the lessons from your experience as you have learned it from the union experience. Take the secret ballot, for example. Most unions in voting on poli-

cies, such as whether they will strike or not, do not have the secret ballot. The Railroad Brotherhoods do. In most unions the vote is by a show of hands; and working people are just like the rest of us —they dislike to stand out against a crowd, and a crowd gets to vote all one way. That means bad management of unions from their own point of view, yet until they learn that employee representation has a better device in that respect they will not be able to meet the competition of company unionism."

I cite this address because in it Dr. Leiserson recognizes the point I am now stressing: The problem of protecting the individual employee against oppressive practices is one thing; the problem arising from the "Competition for Leadership of Labor" is quite another. It is the latter that the National Labor Relations Act leaves in chaotic condition by placing no restraint on the labor organization as a protection to the employer or the unorganized employees.

Those who contend that the National Labor Relations Act needs no amendment mistakenly say the Supreme Court has recognized that the Act is not one-sided. Even if that were true, the *administration* of the Act might, and in our opinion does, promote inequalities calling for Congressional action. The fact is, however, that the Supreme Court did not say the Act was not one-sided. What it did say was this:

> *"We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power."*

We wish therefore to invite the attention of the Committee to what we consider definite inequalities which have been promoted under the protection of the Act. Some of these are inequalities as between the employer and the labor organization; some are inequalities which result from unprohibited restraint, coercion, or discrimination against employees by labor organizations or fellow employees, while prohibiting similar activities on the part of employers:

(1) A labor union may spread false tales about an employer and his policies as to wages, hours and working conditions in an effort to unionize his employees.

The employer may not give his honest opinion about the merits of a labor organization.

In *re Rabhor Company,* 1 NLRB 470 (1936), the Board held that evidence offered by the company to show that the union organizer had falsely advised the employees that the company's wages were lower than in union shops was irrelevant. "The Act," it said, "does not give to us the mandate to examine the speeches and the conduct of those whom the employees choose to follow, and to decide whether, in our opinion, they are worthy to lead." On the other hand, an employer is not allowed to speak adversely of a union or of unionization. Senator Walsh's statement during the debates on the Wagner Bill that "an employee, like an employer, of course, has the right to discuss the merits of any organization" has been effectively disregarded by the Board. In *re Eagle and Phenix Mills,* 11 NLRB No. 33, an election was set aside because of the employer's alleged interference. This interference consisted of (1) the distribution of sample ballots

prior to election instructing the employees how to mark their ballots (but not for whom to vote) and urging all employees to vote; (2) statements by an overseer that it was no business of his how the men voted, but that they knew how conditions were all over the country, especially at Huntsville and Meritas, and should formulate their own opinions (mills in Huntsville and Meritas were shut down and some people believed that the unions had caused the shutdown); (3) statements by an overseer that collective bargaining was a discussion of any issue with management and did not necessarily include an agreement; (4) a statement by an overseer that the men already had collective bargaining in one sense, although there was no union in the mill; (5) a statement by an overseer that distribution of labor literature had incited a disturbance between white and colored workers in a local cotton mill; and (6) a statement by another overseer when asked by employees about the shutdowns at Huntsville and Meritas to "read your papers and see for yourselves."

(2) A labor union can secure an election upon petition to the National Labor Relations Board.

An employer's petition to the Board is utterly disregarded. If, for instance, the A. F. of L. and the C.I.O. are both trying to organize his plant and each calls a strike and causes a shutdown, there is nothing which the employer, in the interests of harmony and in the interests of interstate commerce, can do about it. He is absolutely precluded from asking the Board to hold an election and advise him with which group he should deal. On the other hand, he cannot safely deal with either group. He is caught squarely on the horns of a dilemma not of his own making.

Nor can he find redress in the courts. In *Houston & North Texas M. F. Lines vs. Local No. 886,* 24 F. Supp. 619, the company had a collective bargaining agreement with the union representing the majority of its employees. Two employees who were members of another union and other members of their union picketed the company's dock. One of the company trucks was battered and its driver removed and badly beaten. Business fell off sixty per cent. The striking union did not claim a majority of the employees, but simply contended that under the National Labor Relations Act it was not required to organize the plant or attempt to organize it or ask the National Labor Relations Board to hold an election. The court held that the company was not entitled to an injunction, although it recognized that the company was an innocent victim; that it had fully complied with the National Labor Relations Act; that it had done all that was required by the law and could do no more; that it stood helpless before the court; and that it could not bargain with the striking union without violating the National Labor Relations Act.

(3) A labor union may demand that all employees of a plant be union members, and may call a strike to enforce the demand.

An employer may not demand or even contract that any employee shall not be a union member. (National Labor Relations Act, Sec. 8(1), 8(3), and Norris-LaGuardia Anti-Injunction Act).

Notwithstanding this principle, the latter portion of which now represents settled national policy, it is of interest to note that Mr. Justice Brandeis referred

to them as equally "coercive" (or non-coercive) practices. In his dissent in the Hitchman Case he said: (245 U. S. 229)

> "If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the application will consent to a closed non-union shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workmen may sign the individual agreement for fear the *employment* may not be otherwise obtainable. But such fear does not imply coercion in a legal sense."

(4) A labor organization may strike without making any offer to bargain.

An employer may not engage in a lockout without accepting an offer to bargain, or as a defensive measure against a strike where the demand has been made for collective bargaining.

Reference has already been made to Senator Walsh's statement that the Act recognized certain fundamental rights of the employer as well as the employee. He said 'No one can compel an employer to keep his factory open."

The National Labor Relations Board, however, has held in numerous cases that a shutdown amounted to an "interference." As a result of its decisions, the right to shut down where there is any evidence of union activity in the plant is so circumscribed that it is doubtful whether the right is practically existent.

The right to strike is, of course, expressly preserved in the Act itself. It can be exercised at any time. The union can call a strike without first presenting grievances; it can call a strike when none of the employees are members of the union (*Lauf vs. E. G. Shinner & Co.,* 303 U. S. 323); it can even strike when bargaining negotiations are proceeding satisfactorily. In *re Burnett-Hubbard Candy Company,* 4 NLRB 99, the company and the union had held three bargaining conferences and matters were proceeding entirely satisfactorily when the union suddenly and falsely reported to the membership that the company had refused to negotiate. A strike was called upon receipt of this false information and when *thereafter* the company refused to negotiate further, and the president was clubbed on the head at night by an unknown assailant, the company was held to have violated the Act.

The strike and the lockout are both instruments of labor warfare. Yet both are under some conditions justifiable. They have always been regarded as being the ultimate resort of the employees and the employers respectively. In no other country in the world, so far as I can find, is the right of the employer to close down his plant circumscribed while the right of employees to strike is left unlimited. In England and Sweden, as the President's Commission observed, the employers are permitted to associate, to raise and maintain lockout funds (just as the unions raise strike funds), and to assist any employer in the group in case of a strike or lockout. Such action here would be clearly violative of the National Labor Relations Act.

We do not advocate the unrestricted right of utilizing the lockout weapon, any more than we do the unrestricted right to strike, but if the employer may not utilize that weapon, is it unreasonable to ask that the union be required to recognize, in the language of Senator Wagner's Board:

"The collective bargaining envisaged by the statute involves an equality of obligation—an obligation on the part of employees to present grievances and demands to the employer before striking, and an obligation on the part of the employer to discuss differences with the representatives of the employees and to exert every reasonable effort to reach an agreement on all matters in dispute. Negotiations should precede rather than follow the calling of a strike." (National Lock Case)

(5) A labor union may advise workers that they are *required* to join the union, such advice being untrue.

An employer may not advise workers that they need not join a union in order to hold their jobs, such advice being true.

In the *Midland Steel Products Case,* 4 LRR 129, the Board found that the employer had violated the Act by sending to his employees a letter which said:

"It has been the policy of our company and of you to be fair in all of our associations. A continuation of this policy will bring happiness and prosperity to us all. Many of our employees have recently requested information pertaining to their rights under the Wagner Act. Under this Act, you have the right to name anyone you choose to represent you. You do not have to join any organization. Our policy is to be fair to each employee in every way."

In *re Roberti Brothers,* 8 NLRB 925, the company was held to have violated the Act by notifying its employees that it would not be necessary to join the union in order to keep their jobs; that the policy of the company was not to encourage or discourage union membership; that that was a matter for the employees to decide for themselves; that the employees should let no one tell them that their job depended upon union membership; and that if the employees should leave their employment and should be replaced, the company would be under no obligations to take them back. In *re Elkland Leather Company,* 8 NLRB No. 56, one of the two practices criticized by the Board was the attaching of a statement to employee pay checks that the employees were under no obligation to join a union and they would not be forced to do so, because the company would always operate as an open shop. The notice further stated that the company would always deal individually with any employee who wished to so deal.

(6) A labor union may make exaggerated or even untrue statements to workers with respect to the company for which they work, in order to persuade them to strike.

An employer may not make an exaggerated statement to labor union representatives during the course of collective bargaining negotiations.

In the Rabhor case, union organizers from out of the city made false statements to workers respecting the company's wage policy. These statements were held to be irrelevant by the Board, which added, "Where groups are to be organized and moved into action it is not unusual for the leaders to promise more than can be secured or to indulge in some exaggeration." In the M. H. Birge Case (1 NLRB 731), on the other hand, the company bargained collectively down to the time when the union called a strike. After giving notice to the men that it would fill their jobs with other men, the company began hiring new

employees. It continued, however, to meet with union representatives, and during one of these meetings stated that only five or six vacancies existed in a department normally employing seventeen men. The Board found, as a fact, that the company had actually employed only four new men, but concluded: "Such distortion of the situation obviously transcends the exaggerations that often accompany negotiations in this field."

(7) A labor union may bargain collectively through whatever representatives it may, in its uncontrolled discretion, select.

An employer may not, according to the Board, bargain through whatever representatives he may elect.

This is a position of far-reaching consequence. The Board, and those who sponsored the Act, have emphasized from time to time that the Act merely equalized the positions of the parties,—that employers had always had the unquestioned right to select any agent they chose for collective bargaining, and that the Act did no more than guarantee the same right to the employees. But no sooner had the employees' right been confirmed than the Board proceeded to strip employers of their corresponding right. Nothing whatever restricts the right of union members in their selection of representatives. They may be employees or outside union leaders, responsible or irresponsible, good or bad. As the Board said in the *Rabhor* case, "The Act does not give us the mandate to examine the speeches and the conduct of those whom the employees choose to follow, and to determine whether, in our opinion, they are worthy to lead. That is for the workers alone to decide." The selection made by the workers is, in other words, entirely unrestricted. On the other hand, the Board has ordered an employer to cease using the services of certain persons as bargaining agents or assistants in that connection. (In *re Hopwood Retinning Company,* 4 NLRB 922, where the Board ordered the company to cease "using the services of L. L. Balleisen or any other person for the purpose of evading their obligations under the Act.") Whether the employer bargained directly or through Balleisen or any other representative, he could not legally evade his obligations under the Act, and the order of the Board was therefore directed at Balleisen. (This order was, however, reversed in this particular by the Circuit Court of Appeals for the Second Circuit in *NLRB vs. Hopwood Retinning Company,* 98 Fed. 2d 97, where the court said: "There is no provision of the Labor Act which would justify a disqualification of Balleisen or any other person from preparing an agreement for the employer to present to the employees in the attempt to bargain collectively under the Act. His economic views or suggestions as to the terms of the proposed contract are of no concern to the petitioner. . . . The Board is without power to say what persons may conduct the negotiations.")

In another case the Board ordered an employer to discontinue his membership in an employer's association (In *re Clover Fork Coal Company,* 4 NLRB 202). The American Law Institute is now engaged in the task of restating the law of Torts. One section deals with Labor Disputes. Mr. Madden is a member of the Committee restating the law on this subject. This restatement reflects the view that the *employer* has no unlimited right of acting through an employers' "union" as the *employee,* it is declared, has.

Sec. 25, page 105:

"A labor union or any person acting at the invitation of

workers and on their behalf may exercise for them their privileges of concerted action."

BUT

Sec. 39, page 126:

"An employer's consenting to become, remain or cease to be a member of an association of employers is not a proper object of concerted action by his employees unless they reasonably believe that his membership or non-membership in the association will aid a collective interest of the employees."

(8) A labor union may encourage and induce men to strike by promising strike benefits, and may of course pay such benefits during the strike.

An employer may not discourage a strike by promising employees a bonus if they will refrain from striking.

There can be no doubt about the fact that labor unions can and do sometimes give strike benefits in the form of clothing, food, and cash to strikers. The employer's interest, on the other hand, as well as the public interest, lies in keeping his plant in operation and therefore in preventing strikes. In attempting to prevent strikes, however, he cannot promise a bonus to loyal employees. This was done in the case of In *re Roberti Brothers,* 8 NLRB 925, where the company stated that the employees did not have to join the union to keep their jobs, and that it would pay a Christmas bonus to the loyal workers. Although there was no discrimination in the payment of the bonus, and although the bonus was paid to both union and non-union workers, the Board found that the use of the expression "loyal employees" could only have referred to non-union employees. It branded the promise of the bonus as "a coercive restraint upon the employees' rights of self-organization." The Board held in *re Arcade-Sunshine Company,* 4 LRR 311 (April 15, 1939), that it was an unfair labor practice for an employer to circulate a petition for signature by his employees stating that they would remain loyal to the company and would remain at their posts during a strike. A pledge not to strike, the Board held, is, on its face, an interference with the rights of employees under Section 8, regardless of the employer's motive in circulating it. The employer in this case claimed that it circulated the pledge for the purpose of transmitting to its customers the information that its plant would not be closed by strikes. Such a pledge, the Board said, is a violation of the right to strike and of the right to engage in concerted activities. It interferes with the right to self-organization, since it eliminates one of the most effective methods of organization.

The Board also stated that a discharge was discriminatory, although the employee was, in fact, intoxicated and unable to perform his work. The Board found that intoxication was not the *only* cause of the discharge in view of the other anti-union activities in which the employer engaged.

(9) A labor union may call its members out on strike even in the absence of any grievance against the particular employer.

An employer may not discharge those employees who are fomenting a strike.

This theory has been carried to the following extreme by the NLRB: "To

the extent that the respondent's fears of strike formed an immediate factor in their discharges, this, too, made the dismissals illegal under the Act, for the statute preserves the right to strike for lawful cause, and prohibits employer interference with the rights of employees to engage in concerted activities for their mutual aid and protection." (In *re Servel Inc.,* 4 LRR 157).

Nor can union leaders be discharged for calling a strike, even when unconnected with any unfair labor practices, or for instructing the night shift to begin working before the day shift had finished, thereby causing untold confusion in the plant and usurping the functions of the management. In *re Harnischfeger Corporation,* 9 NLRB No. 64.

In other words, the employer, whose interest lies in keeping his plant operating and free from industrial strife, cannot discharge the employees whom he knows to be fomenting a strike or usurping the functions of management.

(10) A labor union can strike in the absence of any unfair labor practice by the employer.

The employer may not, without grave risk, fill the places of strikers who have struck without any unfair labor practice on his part.

In the *Bennett-Hubbard Candy Company Case,* the employees struck when falsely advised by their representatives that the company would not bargain collectively. The Board found that at the time of the strike there were no unfair labor practices committed by the employer. The same is true of the employer's conduct in the *M. H. Birge Company Case.*

The employer's duty, however, does not end here. The striking employees continue to be employees and he must continue to bargain with them and continue to do nothing prejudicial to the union. If, during the course of the strike, he is guilty of any unfair labor practices, no matter how great the provocation, he will be under the duty of re-employing the workers who have struck in the absence of any unfair labor practices. In the Birge Case, Chairman Madden, dissenting, said, "I think the decision amounts to a holding that the employer whose employees have struck, not as a result of any unfair labor practice on the part of the employer, is legally obligated to close his plant for an indefinite time while he negotiates with the strikers for their return to work. If in the meantime he has employed others in order to keep his plant operating, he must discharge those others." In the *Bennett-Hubbard Case,* the Board ordered the reinstatement of employees who had struck in the absence of any unfair labor practices, the theory of the decision being that the employer had refused to bargain collectively while the strike was in progress (he had also been clubbed on the head).

(11) A labor union may require an employer to give its members protection from non-union workers.

An employer may not secure police protection for non-union men against union workers.

In the *Asheville Hosiery Company Case* (11 NLRB No. 122), the non-union employees ejected eleven union workers from the plant. When one of the union men attempted to return, he was barred by the non-union men, but after the plant manager had spoken with the non-union employees, the union members returned to work. They were out less than two weeks altogether. The Board

stated that it was the duty of the company to guarantee safety to all of its employees, and the company was ordered to provide adequate protection for the union workers.

In the *Brown Shoe Company Case,* on the other hand (1 NLRB 803), from fifty to seventy-five union members picketed the plant, while about 300 employees went in to work. Fearing violence at the noon lunch hour, the plant manager called on the chief of police, and the chief of police of the town broke the picket line up at about 11:30. The mayor of the town testified that the chief of police did this in order to prevent violence at noon. With respect to this activity, the Board said (page 830): "We find that the respondent's conduct in that respect amounts to interference, restraint, and coercion of its Salem plant employees in the exercise of their right to concerted activities for mutual aid and protection guaranteed them by the Act."

(12) A labor union may put on a vigorous campaign for a closed shop, and tell employees it is going to secure one,—that if they don't join the union they'll be out of jobs as soon as the closed shop arrangement is made.

The employer may not advise employees that he will not agree to a closed shop.

In speaking before the International Juridical Association in New York on January 15, 1938, Board member Edwin S. Smith cited as ineffective the following statement which a union man might make to a non-union man: "If you don't join up, you may be out of a job some day when we get this plant organized."

This situation was formally presented to the Board in the recently-decided case of *Dahlstrom Metallic Door Company,* 11 NLRB No. 38. An election having been held and the CIO having won over an independent union, the election result was challenged on the ground the CIO organizers had told non-union employees that if they delayed in joining they would be charged a higher initiation fee later on, and would lose their jobs when the CIO obtained a closed shop. The Board rejected the complaint and held the employer guilty of refusal to bargain.

The employer, on the other hand, cannot tell his workers that he expects to maintain an open shop policy. In the Elkland Leather Company Case (8 NLRB 519), the company notified its employees that they were under no obligation to join a union and could not be forced to do so, because the company would always operate as an open shop. The Board found that by this act the company coerced its employees in the exercise of rights guaranteed by Section 7.

Again, in the *Lindeman Power & Equipment Company Case* (11 NLRB No. 66), the company, in response to questions by the employees, stated that the company would never consent to a closed shop, and that if employees feared they would lose their jobs under a closed shop, they should cease to worry, because if a closed shop agreement were demanded, it would be refused. The Board found that the company was guilty of interfering with the rights of its employees to organize.

In the *Roberti Brothers Case* (8 NLRB 925), the Board branded as guilty a company which had advised its employees to let no one tell them that their

jobs depended upon union membership, and in the Midland Steel Company Case (11 NLRB No 112), the Board criticized the company for advising its employees that they did not have to join any union.

(13) A labor union may discriminate in any manner it sees fit against applicants for union membership, against its own members, or in expelling members.

An employer not only may not discharge or refuse to employ a man because he is a union member, but he may not take any kind of action, disciplinary or otherwise against any employee, which the Board may hold to be a discrimination "because of union activity."

Time will not permit a complete discussion of the extremes to which the Board has gone in applying the prohibitions of Section 8(3), but the Committee's attention is invited to an extremely interesting article in the Yale Law Journal for May, 1939, entitled "Discrimination Under the National Labor Relations Act" by Chester C. Ward, Assistant Professor of Law, George Washington University Law School, and Associate Editor, Labor Relations Reporter. Professor Ward, recognized as a friendly critic of the Act and the Board, concludes in part:

> "Thus it was that the great Supreme Court decisions of April, 1937, held infinite promise. They made possible under the Act a single consistent body of law applicable to almost all important industries insofar as the entire collective bargaining process was concerned. Then the Board began administering the Act *through a process of reading things into it which just were not there—such as direct protection by Section 8(3) of all types of 'union activities.'"* (Italics mine)

On the other hand, unions may impose any kind of restrictions on employees who happen to be union members, or who because of a closed shop contract may seek admission to membership.

For instance, Mr. Madden, in his statement, quoted with approval the words of Mr. Chief Justice Hughes, that government could make no distinction between *aliens* and *citizens* under the equal protection clause of the Constitution. This was cited in opposition to a provision in Senate Bill 1264.

Restrictions on Union Membership

It is interesting to note the following from pages 37 to 39, inclusive, of the "Handbook of American Trade Unions," 1936, published by the U. S. Department of Labor:

> "An important restriction practiced by some of the large organizations, particularly in the building trades, pertains to citizenship. Aliens must either be naturalized or have declared their intention of becoming citizens by taking out their first papers before joining the organization. It is interesting to note that the Hodcarriers, Building, and Common Laborers' International Union, an organization with a very large proportion of foreign-born members, has that provision. The United Licensed Officers require actual citizenship, and the International Seamen's Union uses the phrase 'eligible to become citizens,' a limitation which

bars Asiatics without specifically refusing them membership because of race. In some cases, notably in the Federal service, citizenship is a prerequisite to employment. Hence, although the stipulation is not made in the constitutions of organizations in this field, its members are necessarily citizens.

"The minimum-age requirements shown in the chart are in most cases those applying to apprentices. Where an organization has a maximum age limit, applicants who are older than the fixed age may in many cases be admitted as non-beneficiary members, but in actual practice the number of elderly men applying for union membership is probably negligible.

"Another interesting aspect of attempted selection of membership is the clause in some constitutions barring persons who hold membership in certain other organizations. Usually this is a precaution against radicalism as expressed by the I. W. W., the Communist Party, and other organized minorities. In other cases, as in the United Mine Workers, it is also used to exclude ultra-conservative or reactionary doctrines. Many organizations have a prohibition against dual membership.

"On the whole the qualifications fixed by constitutional provisions are not such as would be apt to exclude any considerable number of applicants. At the same time, as already stated, these provisions do not, in all cases, tell the whole story."

In 1922 Mr. Gompers was testifying before the Committee of the New York Legislature Investigating Housing Conditions. He was asked about limitations on union membership, and replied that, as a matter of principle, he could find no justification for such limitations, but that, as a matter of practice, they were justified by the necessity of the unions for self-preservation. He regarded expulsion as equivalent to capital punishment, and condemned as practical expulsion the levying of fines of from $500 to $2,000 upon union members, yet at the same time he insisted that no one outside of the labor union should have any right to review exclusions, fines, or expulsions. He admitted that since October, 1920, the books of the Plumbers' Union in New York had been closed so that no new members could be admitted *except sons or brothers of members.*

Excessive Union Dues and Fees

We are advised, for example, that in Chicago the Elevator Operators' Union, Local No. 66, charges an initiation fee of $250.00; the Electricians' Union, Local No. 134, has an initiation fee of one thousand dollars, and dues of $100 per year; a man may be permitted to work on a so-called "Permit" card issued for $200.00, the balance to be paid later. If a member is suspended by the union, even for non-payment of dues, it is necessary to pay a reinstatement fee of $325.00.

The Chicago Flat Janitors' Union, Local No. 1, with approximately 10,000 members, charges an initiation fee of $300.00, and dues of $60.00 per year.

The Chicago Milk Wagon Drivers' Union, Local No. 753, with 6,000 members, charges an initiation fee of $100.00, and dues of $72.00 per year, with an additional assessment of $1.50 per week beginning May 1, 1939.

The Painters' Union, with about 8,000 members, has an initiation fee of

$100.00, and dues per quarter (depending on the local) of $6.75 to $13.00.

Professor Paul H. Douglas of the University of Chicago says in an article in the March, 1939, issue of the International Labor Review:

> "It is not an unusual practice, for example, for the craft unions in the United States to have initiation fees which run into hundreds of dollars."

We do not question the right of any organization to fix any schedule of dues it sees fit. We do question a policy which permits any organization, by virtue of a closed shop arrangement, to compel men to pay excessive initiation fees and dues as the price of having a job.

The National Industrial Recovery Act provided that employer groups might submit "codes of fair competition." It specifically provided two conditions, however, which must be met before the codes would even be received: First, the group must be "truly representative" of the trade, industry, or subdivision thereof, and second, *it must impose no inequitable restrictions on admission to membership.*

It seems to us mere elementary justice that if the closed shop is to be permitted to exist, since employees then have no option but to join the union, they should be protected against improper union levies, restrictions or exactions. The new Wisconsin Employment Peace Act, recognizing this need, has several important provisions.

1. There can be no closed shop agreement except in pursuance of a secret ballot of employees on that question
2. There must be an affirmative three-fourths vote of the employees
3. "The Board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the Board."

Inequality: "Clean Hands," A One-Way Doctrine?

(14) A labor union may invoke the services of the National Labor Relations Board and the benefits of the Act without any showing of clean hands.

An employer may not invoke the services of the Board at all, to secure an election, even in cases of bona fide doubt as to which of two contending unions, if either, represents a majority of his employees. Neither can he invoke the aid of Federal or State equity courts in connection with a labor dispute unless he can satisfy the "clean hands" requirement.

In the Federal courts, the employer cannot obtain a restraining order against a labor union unless he can show: (a) that unlawful acts have been threatened and will be committed unless restrained; (b) that substantial and irreparable injury will follow; (c) that greater injury would be inflicted upon him by the denial of relief than will be inflicted upon the union by granting the relief; (d) that he has no adequate remedy at law; and (e) that local enforcement officers are unable or unwilling to furnish adequate protection (29 U. S. C. A.

107). He must also comply with all obligations imposed by law involved in the labor dispute in question and he must make every reasonable effort to settle the dispute either by negotiation or by invoking available governmental machinery of mediation or arbitration (29 U. S. C. A. 108).

In the case of *Lund vs. Woodenware Workers' Union,* 19 Fed. Supp. 607 (D. C. D. Minn. 1937), the plaintiff contracted with a majority of his employees, and the minority struck. By intimidation and violence of the minority, the majority was prevented from working, and the plant thus closed. The plaintiff sought resort to court on the ground that the NLRA impliedly protects him from minorities after he has bargained with the majority. The court held that no such right was created, and denied relief, but in doing so, it suggested in the following words that the Act be amended:

> "If the employer is powerless under the Act to initiate any proceedings, as plaintiff contends, then of course, it would seem that Congress might well remedy that situation. If there is to be peace and harmony, as between labor and capital under this Act, it would seem that unfair labor practices on the part of the employees should also be amenable to the orders of the Board upon petition of the employer."

We invite particular attention to a statement made before this Committee by Mr. Donald Wakefield Smith, retiring member of the National Labor Relations Board:

> "However, Congress intended that labor should resort to the protection afforded by this statute rather than to rely upon the use of economic weapons."

The National Labor Relations Act does not so provide, and the National Labor Relations Board has never made such intention effective.

In addition to these clarifying and procedural amendments, we emphasize particularly these recommendations for amendments, made throughout the course of our presentation:

1. The preamble should be rewritten.
2. Revised definitions of "employees" and "current labor dispute" should be incorporated in the Act.
3. Employees should be protected against unfair labor practices, whether practiced by employers, labor organizations or fellow-employees. Reasonable limitations upon the right to strike should be recognized, and the benefits of the Act should be withheld from those engaging in certain types of strikes, already enumerated in our statement.
4. The Closed Shop and the Check-Off should be definitely prohibited, as they are under the Railway Labor Act.
5. Freedom of speech should be safeguarded by clear and appropriate language.
6. Employer petitions for elections should be acted on by the Board, and such action should be mandatory

where the employer is confronted by two or more groups, each claiming to represent a majority of the employees.

7. Consideration should be given to elimination of the so-called majority rule provision, but if the rule is retained experience shows that other amendments must be made to make it effective and at the same time to protect those who do not wish to affiliate with the majority group.

8. The Board should not be permitted to make compulsory multiple-unit certifications, combining in one unit the employees of a number of employers.

9. A definite statute of limitations should be provided, so that employers may not be proceeded against long after the occurrences to which the complaint relates.

10. The complaining party in any proceeding before the Board should have the burden of substantiating its charges, the Board's function being merely that of determining the issues presented by the parties.

11. Labor organizations desiring to exercise the privilege of acting as collective bargaining agents should be required to place and keep on file with the Board, subject to inspection, reasonable information with respect to themselves and their responsibility.

[*—Washington, D. C.*
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